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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 854

THE STATE OF OHIO ON RELATION OF LOUIS MORREY
GREENSTEIN,

Petitioner,

vs.

HONORABLE JOSEPH M. CLIFFORD, ET AL., AS
JUDGES OF THE COURT OF COMMON PLEAS OF FRANKLIN
COUNTY, OHIO,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO AND BRIEF IN SUP-
PORT THEREOF.

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**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO AND BRIEF IN SUP-
PORT THEREOF.**

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

Your petitioner respectfully shows:

The record and judgment of which a review is hereby sought by writ of certiorari are in the cause heretofore pending in the Supreme Court of the State of Ohio, styled: The State of Ohio on relation of Louis Morrey Greenstein, plaintiff-relator-appellant vs. Honorable Joseph M. Clifford, et al., as Judges of the Court of Common Pleas of Franklin County, Ohio, defendants-appellees, being Cause

No. 30,364 on the docket of said Supreme Court of the State of Ohio.

The duly certified record in the Supreme Court of the State of Ohio, to which an appeal was taken from the Court of Appeals of Franklin County, Ohio by petitioner here, is filed herewith under separate cover.

Your petitioner represents that he is aggrieved by the final judgment of the Supreme Court of the State of Ohio entered in said cause by which the said Supreme Court of the State of Ohio affirmed on the 21st day of November, 1945 the judgment of the trial court, being the Court of Appeals of Franklin County, Ohio. Said trial court denied the petition of your petitioner for a writ of prohibition to prohibit the Court of Common Pleas of Franklin County, Ohio, from hearing or entering any order or judgment relating to any issue in the second cause of action in a petition now pending therein in a suit, styled: Phillip A. Thal, plaintiff vs. Louis Morrey Greenstein, defendant.

Your petitioner states that the matters of issue in said cause are of a federal nature and are of peculiar gravity and unusual importance in that petitioner contends no state court of the State of Ohio has any jurisdiction to try any of the issues in said second cause of action, now pending in the Court of Common Pleas of Franklin County, Ohio, because exclusive jurisdiction to approve the alleged additional compensation is vested in the Wage Stabilization Board, succeeding the War Labor Board.

The fires of inflation are burning more dangerously today than they were during the war period and especially at the time when the Wage Stabilization Law was enacted. The purpose of the enactment of this law as stated in its title is to control inflation. If Thal succeeds in his plan to recover under an alleged oral agreement an increase in wages payable at the end of 1942, as he contends for, merely because

the war is ended, the purpose of the Wage Stabilization Law will be emasculated. That law will not serve as a brake on inflation. There are doubtless thousands of instances where employers told employees to wait until after stabilization restrictions were lifted and then they would be paid increases, which they insisted upon, for the period of time stabilization restrictions were in effect, but which were not approved by the War Labor Board during the war. If all of these promises, most of which, of course would be oral because a written promise would be evidence of a criminal violation of the Wage Stabilization Law, can now be enforced, the burning fires of inflation will blaze more disastrously.

This is a case of novel impression in this court. The United States District Court for the Eastern District of Pennsylvania on May 10, 1945 in *Werhardt v. Koenig* (60 Federal Supplement) refused to enforce an analogous wage agreement because it violated the Wage Stabilization Law. Hence, petitioner asserts again that it is of unusual national importance and of great and general public interest.

Summary and Short Statement of the Matter Involved

Petitioner, as a retail merchant in the City of Columbus, Ohio, employing more than eight persons at all times in question, is subject to the Federal Wage Stabilization Law, being officially known as "An Act to Amend the Emergency Price Control Act of 1942, to Aid in Preventing Inflation, and For Other Purposes". (c. 578, Sec. 7, 56 Stat. 767 (U. S. C. T. 50 App. Sec. 901(b))). Hence, he is subject to the jurisdiction of the Wage Stabilization Board. (Executive Order 9672—December 31, 1945, F. R. 11, p. 221, published January 4, 1946.) That Board is charged by federal law with enforcement of the Federal Wage Stabilization Law from which pertinent quotations are made at length

in the petition filed by this petitioner in said Court of Appeals of Franklin County, Ohio (relator below) (R. 1-9) to which reference is made for sake of brevity rather than to repeat the quotations here.

Petitioner employed Phillip A. Thal, who filed the above mentioned action in the Court of Common Pleas of Franklin County, Ohio, against the instant petitioner to recover on two different causes of action on two alleged *oral* agreements to pay him bonuses or additional compensation at the end of 1941 and also at the end of 1942. The Federal Wage Stabilization Law, not becoming effective until October 2, 1942, has no application to the bonus alleged to have become payable at the end of 1941, but it does directly confer exclusive jurisdiction on the Wage Stabilization Board as successor to the War Labor Board over the bonus alleged to have become payable at the end of 1942.

Hence the petitioner, as relator in the trial court in Ohio, being the Court of Appeals of Franklin County, Ohio, filed his petition for a writ of prohibition against the Judges of the Court of Common Pleas of Franklin County, Ohio, to prohibit them from hearing any of the issues contained in the second cause of action of Thal's amended petition in said Common Pleas Court suit.

The Court of Appeals of Franklin County, Ohio, denied the petition for a writ of prohibition and its said judgment was affirmed by the Supreme Court of the State of Ohio by final judgment entered, as aforesaid, on November 21, 1945.

Thal has, by his efforts to recover a judgment from the instant petitioner in said Common Pleas Court action, attempted to create a method of procedure to circumvent the said paramount Federal law which confers exclusive jurisdiction on the Wage Stabilization Board to approve

first said additional compensation, claimed in said second cause of action.

In said Common Pleas Court action Thal has as his objective the obtaining of a judgment against the instant petitioner and enforcement thereof by execution upon the latter despite the provision of the Federal Wage Stabilization Law that no wages can either be increased or decreased after October 3, 1942 without the prior approval of the War Labor Board, now the Wage Stabilization Board. Thal declines to present his claim for additional compensation to the War Labor Board for approval.

The petition in prohibition so filed by the instant petitioner alleged that sole jurisdiction to approve said claim of Thal in his second cause of action was vested in the War Labor Board of the United States (now in the successor Board known as the Wage Stabilization Board) under an Act of Congress entitled "An Act to Amend the Emergency Price Control Act of 1942 * * *", duly approved by the President of the United States on October 2, 1942, (c. 578, sec. 7, 56 Stat. 767) (U. S. C. T. 50 App. sec. 901 (b)) and also under Executive Order No. 9250 issued by the President of the United States pursuant to said Act of Congress (7 F. R. 7871, as amended by Executive Order No. 9381, September 25, 1943, 8 F. R. 13,083).

Said petition for a writ of prohibition further alleged that a general demurrer was overruled by said Court of Common Pleas in said action of *Thal v. Greenstein*.

Said petitioner further says (R. 6-7) therein:

"* * * by virtue of said Act of Congress and said Executive Order such approval is required and said Board has sole jurisdiction to determine whether said oral agreement of employment of said Thal by your relator actually was made and, if so, its meaning and that said Court of Common Pleas has no jurisdiction whatsoever to construe said agreement or

to enforce the same prior to the approval thereof by the National War Labor Board or one of the several regional War Labor Boards constituted to assist said National War Labor Board in the several areas into which the United States is divided for the purpose of the administration of said Act of Congress and said Executive Order * * *.

"Relator further says that the decision by any state court of said action so instituted by said Thal against your relator is in no way and to no extent binding upon the War Labor Board. The War Labor Board may arrive at an entirely different decision than that announced by the state court in the above entitled action as to the existence or construction of said oral agreement alleged to have been entered into between your relator and said Thal. There is no appeal to the courts from any such decision by the War Labor Board but its decision is final. * * *.

"Your relator declares that he has no adequate remedy either at law or in equity if, by judgment of the Common Pleas Court in said above described action, he is ordered to pay the amount claimed by said Thal in his alleged second cause of action. Your relator may nevertheless be subjected to fine and imprisonment for violation of the said Act of Congress as alleged above and also be denied the right to deduct said payment together with all other compensation paid to said Thal in arriving at his net income for the purpose of computing his Federal income tax because the Commissioner of Internal Revenue is authorized to deny a deduction for all compensation paid to an employee where the portion thereof, constituting an increase, has not been properly first approved by the War Labor Board which increase became effective after October 3, 1942, or as provided in United States Treasury Department Regulations, section 1002.28, as amended by Treasury Decision 5295." (1943 Cumulative Bulletin of the Bureau of Internal Revenue 1193.)

Said Court of Appeals of Franklin County, Ohio, on April 16, 1945, after allowing an alternative writ of pro-

hibition, quashed the same and sustained respondents' demurrer to said petition for a writ of prohibition and dismissed said petition.

An appeal was prosecuted by the instant petitioner as a matter of right in the Supreme Court of the State of Ohio. An assignment of errors was filed therein (R. 17). That court affirmed the trial court by judgment entry dated November 21, 1945 (R. 25).

Opinions of the Courts Below

The trial court in this case, being the Court of Appeals of Franklin County, Ohio, having original jurisdiction in the instant proceeding for a writ of prohibition, wrote an opinion. This is published in 61 N. E. 2d 921 and printed in the record herein (R. 19-23).

The Supreme Court of the State of Ohio wrote an opinion which is published in 146 O. S. 78 and printed in the record herein (R. 26-27).

Jurisdiction of This Court

Jurisdiction of this court is based upon the Judicial Code, Section 237 as amended by the Act of Congress of February 13, 1925, 43 Stat. 937, U. S. C., Title 28, section 344, paragraph (b), permitting petitions for writs of certiorari to be prayed for and issued to the highest state courts of the various states where a title, right, privilege or immunity is especially set up or claimed under a statute of the United States.

The action here sought to be reviewed, having been based upon "An Act to Amend the Emergency Price Control Act of 1942, to Aid in Preventing Inflation, and for Other Purposes" (c. 578, sec. 7, 56 Stat. 767, U. S. C. T. 50 App. sec. 901 (b)), and Executive Order No. 9250 (7 F. R. 7871, as amended by Executive Order No. 9381 September

25, 1943, 8 F. R. 13,083), the jurisdiction of this court attaches because the Supreme Court of the State of Ohio has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by affirming the said lower court, as to call for an exercise of this court's power of supervision.

Some authorities sustaining the jurisdiction are:

In re Huguley Manufacturing Co., 184 U. S. 297, 301;
Southern Railway Co. v. Southern Railroad Commission, 236 U. S. 439;

Northern Pacific Railway v. North Dakota, 250 U. S. 135;

Pearson Candy Co. v. Waits (California Supreme Court), 7 Labor Cases 61919 (1943);

International Association of Machinists v. Florida, 15 So. 2d 485, 153 Fla. 672, 13 LRR 433 (1943).

International Brotherhood of Paper Makers v. Wisconsin Employment Relations Board, 245 Wis. 541, 15 LRR 224 (1944), 15 N. W. (2d) 806.

The Supreme Court of the State of Ohio is the highest court in the State of Ohio.

The original date of the final judgment of the Supreme Court of the State of Ohio, here sought to be reviewed is November 21, 1945.

Questions Presented

The basic question presented in this court on this record is whether an action under an alleged oral agreement to recover, as a bonus or additional compensation, an amount alleged to be payable at the end of 1942, after the Federal Wage Stabilization Law became effective, can be properly maintained in the Common Pleas Court of Franklin County, Ohio, as an action for the recovery of money only before

the right to pay such additional compensation is first submitted to or approved by the War Labor Board, or its new successor, the Wage Stabilization Board as the body having exclusive jurisdiction over this question.

As a corollary to this basic question, there is the question whether the War Labor Board has the sole and exclusive jurisdiction, not only to determine whether the additional compensation may be paid to the employee, but whether the existence and construction of the alleged oral agreement relating thereto is to be decided *only* by the War Labor Board as an incident to its exclusive jurisdiction over the determination of what wage increase may be paid.

Summary of Reasons for Allowance of Writ

I

In this case the Supreme Court of the State of Ohio has refused to issue a writ of prohibition to restrain the Court of Common Pleas of Franklin County, Ohio, from proceeding with the trial of the alleged second cause of action in the case entitled: *Phillip A. Thal v. Louis Morrey Greenstein*, although the Federal Wage Stabilization Law and Executive Order No. 9250 issued pursuant thereto dated October 3, 1942, being the paramount law of the land, vests exclusive jurisdiction to authorize wage increases after that date in the War Labor Board.

II

The failure of the Supreme Court of the State of Ohio to rest its decision solely on the federal right arising under the Federal Wage Stabilization Law and Executive Order No. 9250 is not conclusive, but the Supreme Court of the United States will decide the federal question if the necessary effect of the judgment of the state court is to deny the federal right which was specially set up and claimed at the

commencement of this proceeding since if the federal right is recognized and enforced a different judgment would be required from one resting in part upon local law.

Specifications of Errors to Be Urged

The Supreme Court of the State of Ohio erred:

1. In affirming the final judgment of the court of original jurisdiction of the State of Ohio which latter court denied a petition for a writ of prohibition to restrain the Court of Common Pleas of Franklin County, Ohio, from exercising any jurisdiction over the alleged second cause of action of the amended petition in the action of *Phillip A. Thal v. Louis Morrey Greenstein*, the latter being the instant petitioner.

2. Because sole and exclusive jurisdiction is vested in the Wage Stabilization Board, successor to the War Labor Board, to authorize any increase in wage payments at the end of 1942 after the Wage Stabilization Law and after Executive Order No. 9250 became effective.

3. Because the Wage Stabilization Board, successor to the War Labor Board, has exclusive jurisdiction to authorize an increase in wage payments to be made effective at the end of 1942 and no state court may enter a judgment in favor of an employee and against his employer or otherwise exercise jurisdiction in an action seeking to recover such an increase, alleged to be due and payable at the end of 1942, until after said increase is approved by said Board.

4. Because incident to the exercise of said exclusive jurisdiction the Wage Stabilization Board has sole and exclusive jurisdiction to determine if an alleged oral agreement was made between petitioner here as the employer and Thal as the employee by which a lump sum was to be paid at the end of 1942 representing an increase in wages.

5. In adjudicating, under the guise of a finding that the Court of Common Pleas of Franklin County, Ohio, has general jurisdiction of the subject matter of the right to recover a money judgment under an agreement of employment, the right of the employee to recover an increase in wages effective at the end of 1942 without the requisite prior approval of said increase by the War Labor Board, now succeeded by the Wage Stabilization Board, since the determination of the latter issue is vested primarily in said Board.

6. In failing to recognize the primary jurisdiction of the War Labor Board, now succeeded by the Wage Stabilization Board, to determine whether said increase in wages may lawfully be paid at the end of 1942 in a lump sum before exercising any jurisdiction in a suit by the employee against the employer to recover said lump sum.

7. In failing, because of the foregoing, to reverse the court of original jurisdiction of the State of Ohio and in failing to grant a writ of prohibition restraining the Court of Common Pleas from exercising any jurisdiction over said alleged second cause of action of Thal's amended petition against the instant petitioner until after the War Labor Board (now the Wage Stabilization Board) has approved said wage increase.

8. In depriving petitioner by virtue of the foregoing errors, of the rights, privileges and immunities vested in him under the Emergency Price Control Act of 1942, as amended, and Executive Order No. 9250, as amended.

Prayer

For the purpose of correcting the errors complained of and to the end that the rights of the petitioner may be determined in accordance with the federal law, your petitioner respectfully prays that a writ of certiorari be issued under

the seal of this court, directed to the Supreme Court of the State of Ohio, commanding it to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the record and proceedings of the said Supreme Court of the State of Ohio in the within described action of *State of Ohio ex rel. Louis Morrey Greenstein, Relator-Appellant* (the instant petitioner) v. *Honorable Joseph M. Clifford, et al., as Judges of the Court of Common Pleas of Franklin County, Ohio, Defendants-Appellees*, No. 30,364 on the docket of said court, as provided by law, and that your petitioner may have such other relief as to this court may seem appropriate, and that the said judgment of the Supreme Court of the State of Ohio may be reversed by this Honorable Court.

STATE OF OHIO EX REL.,

LOUIS MORREY GREENSTEIN,

Petitioner;

By HUGH M. BENNETT,

Counsel for Petitioner.

